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No. 720

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

WILL RAY HENRY,
Petitioner,

vs.

DELHI-TAYLOR OIL CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF FOR DELHI-TAYLOR OIL CORPORATION IN OPPOSITION

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OPINION BELOW

The opinion of the Supreme Court of Texas (Pet. App. A, 1-6) is reported at 416 S.W.2d 390; however, the date of the overruling of the Motion for Rehearing was erroneously reported as July 14, 1967, instead of the correct date of July 12, 1967.

JURISDICTION

The Supreme Court of Texas delivered its opinion on May 31, 1967, and Petitioner's Motion for Rehearing was denied on July 12, 1967. (See Appendix "A", the notification from the Clerk of the Supreme Court of Texas) In attempting to invoke the jurisdiction of this Court under 28 U.S.C., § 1257(3) (1949), the Petitioner has failed to comply with the requirements of timely filing imposed by 28 U.S.C., § 2101(c) (1958).

QUESTIONS PRESENTED

1. Whether the Supreme Court of Texas in construing and applying its own rules of civil procedure has deprived Petitioner of due process of law as guaranteed under the Fourteenth Amendment to the United States Constitution.

2. Whether a decision of the Supreme Court of Texas which merely confirms existing state law as it had been announced by intermediate appellate courts whose opinions had been subjected to review by the Supreme Court, has deprived Petitioner of a right to a "hearing" as guaranteed under the Fourteenth Amendment to the United States Constitution, when the Supreme Court expressly overruled an old opinion that had already been impliedly overruled.

ARGUMENT

1. Writ of certiorari should be denied because the petition was not filed with the Clerk of this Court within the time prescribed by law.

A petition for writ of certiorari, intending to bring a judgment in a state court civil action before the Supreme Court for review, must be filed within ninety days after the entry of such judgment. 28 U.S.C., § 2101(c) (1958). In the instant suit, Petitioner's Motion for Rehearing was denied by the Supreme Court of Texas on July 12, 1967, as evidenced by the notification sent by the Clerk of the Supreme Court of Texas to all attorneys of record (see Appendix "A"). The publisher of the Southwestern Reporter incorrectly printed the date when reporting the opinion of the Supreme Court of Texas (416 S.W.2d 390). The petition for writ of certiorari was filed on October 12, 1967. The intervening period of time between these two dates is ninety-two days.

A review of the decisions of this Court in applying 28 U.S.C., § 2101(c) (1958) (formerly 28 U.S.C., § 350 (1940)) discloses that the prescribed time period for filing is jurisdictional. *Matton Steamboat Co.* v. *Murphy*, 319 U.S. 412 (1943); *Federal Trade Com.* v. *Minneapolis-Honeywell R. Co.*, 344 U.S. 206 (1952); *United States* v. *Adams*, 383 U.S. 39 (1966). The policy involved in this statutory limitation on the Supreme Court's jurisdiction was discussed by the Court in *Matton Steamboat Co.* v. *Murphy*, supra, when in considering the timeliness of an appeal it stated (319 U.S. 412, 415):

> "The purpose of statutes limiting the period for appeal is to set a definite point of time when litiga-

> tion shall be at an end, unless within that time the prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would defeat its purpose."

In *Federal Trade Com.* v. *Minneapolis-Honeywell R. Co.*, supra, 344 U.S. 206, 213, which was a suit involving a writ of certiorari, the Court recognized this limitation on its jurisdiction when it stated:

> ". . . we do mean to encourage applicants to this court to take heed of another principle—the principle that litigation must at some definite point be brought to an end. It is a principle reflected in the statutes which limit our appellate jurisdiction to those cases where review is sought within a prescribed period."

Respondent recognizes that the period of time for filing a petition for writ of certiorari may be extended, for good cause shown, as provided in 28 U.S.C., § 2101(c) (1958) and Rules 22, 34 and 50 of the Rules of the Supreme Court of the United States. Respondent has not been notified by Petitioner of any request for extension of time to file his petition for writ of certiorari. If Petitioner has in fact filed for an extension of time, it is submitted that Petitioner has failed to comply with the requirements of the aforementioned Rules, inasmuch as Respondent has never been notified of such an application or any action taken with regard to such application. Furthermore, Respondent has not been informed of any extension of time for applying for a writ of certiorari being granted by a justice of the Supreme Court within the ninety-day period following the denial of Petitioner's Motion for Rehearing by the Supreme Court of Texas.

Since Petitioner has failed to comply with the established statutory provisions and court rules governing the

filing and docketing of petitions for writ of certiorari, it is Respondent's contention that this Honorable Court is without jurisdiction to grant the requested writ.

2. The Supreme Court of Texas has merely construed and applied its own Rules of Civil Procedure.

Respondent contends that there is not any special or important reason alleged by Petitioner why this Court should grant a review on writ of certiorari. The Texas Supreme Court in its opinion has not decided any federal question; rather, it has merely interpreted its own rules of civil procedure and the case law of its own jurisdiction in a manner contrary to Petitioner's desires. Furthermore, Respondent contends that Petitioner has not been deprived of due process of law as provided for in the Fourteenth Amendment of the United States Constitution.

In order to discuss sensibly the Petitioner's assertion that the Texas Supreme Court did not properly apply Rule 279, Texas Rules of Civil Procedure, it is necessary, initially, to determine which of the parties in the instant litigation had the burden of submitting and obtaining a favorable jury finding on Respondent's failure to warn or to give adequate warning under the circumstances. Only upon resolving this question will it be possible to discuss intelligibly the application of Rule 279 in relation to Petitioner's application for writ of certiorari.

It is well-settled law in this state that in a suit by an invitee against an occupier of land:

> ". . ., the invitee must not only prove that he was injured as a proximate result of encountering a condition on the premises involving an unreasonable risk of harm, *but he must also prove, as a part of the*

plaintiff's case, that the occupier owed him a duty to take reasonable precautions to warn him or protect him from such danger, i.e., the plaintiff must negative 'no duty'." (Emphasis added). *Halepeska* v. *Callihan Interests, Inc.*, 371 S.W.2d 368, 378 (Tex. Sup. 1963).

Likewise, in a later case involving the duty that an occupier of premises owes to an invitee, the Texas Supreme Court said, "it was incumbent upon plaintiff to have requested issues to negative the adequacy of the warning, if this was his position." *Western Auto Supply Co.* v. *Campbell*, 373 S.W.2d 735 (Tex. Sup. 1963).

A review of the record in the instant case discloses that this case was filed in the trial court on July 15, 1961; on July 1, 1963, Respondent filed its First Amended Original Answer, which constituted its trial pleadings for the first trial that started on November 12, 1963 (resulting in a hung jury) and for the second trial which started June 1, 1964, from which this case was appealed. In that pleading, Respondent pleaded that it breached no duty owing to Petitioner. Petitioner failed to request any issues concerning the warning or the adequacy of the warning which Respondent gave to Petitioner's employer, even though Respondent pleaded "no duty" and uncontroverted evidence was presented to show that such a warning had been given. Respondent's Motion for Instructed Verdict and Motion for Judgment Non Obstante Veredicto in the second trial of this case, as well as Respondent's Motion for Judgment Non Obstante Veredicto in the first trial and the trial brief in support thereof, are set forth as appendices for the Court's convenience. (See Appendices "B"-"E"). A review of paragraph II of each of these motions (see Appendices "B", "D" and "E") discloses that the question of warning and the adequacy of the warning

given was unquestionably presented at the earliest level of this proceeding.

It is Respondent's contention, as the Supreme Court of Texas found, that:

> ". . . the evidence establishes conclusively that the dangerous condition on the premises which resulted in injury to Henry was, in the light of the warning given, as well known to Vickers (Petitioner's employer) and his superintendent-foreman, Bernie B. Smith, as it was to Delhi-Taylor." 416 S.W.2d 390, 393 (Tex. Sup. 1967).

If, as Petitioner contends, there was a fact issue presented with regard to the warning given (Pet. App. 3-4), the duty was upon Petitioner to request jury issues on this independent ground; and in the absence of his so doing, the issue is deemed waived as provided in Rule 279, Texas Rules of Civil Procedure.

An understanding of Rule 279 cannot be obtained by paraphrasing the language of the rule in such a manner as to denude the rule of its meaning (Pet. App. 5). For the Court's convenience, the second paragraph of the rule is set forth in its entirety:

> "Rule 279. Submission of Issues.
>
> * * *
>
> "*Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived;* but where such ground of recovery or of defense consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery or of defense, and necessarily referable thereto, are submitted to and answered by the jury, and one or more of such issues are omitted, without such request, or objection, and

there is evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted issue or issues in support of the judgment, but if no such written findings are made, such omitted issue or issues shall be deemed as found by the court in such manner as to support the judgment. A claim that the evidence was insufficient to warrant the submission of any issue may be made for the first time after verdict, regardless of whether the submission of such issue was requested by the complaining party." (Emphasis added).

It is elementary that a party upon whom the burden rests to establish something in evidence must plead, introduce evidence and obtain a favorable jury finding (or it must be conclusively established by the evidence).

As has been outlined previously, in Texas, the injured party has the duty to prove either no warning or inadequate warning. *Halepeska* v. *Callihan Interests, Inc.*, supra; *Western Auto Supply* v. *Campbell*, supra.

Inasmuch as Petitioner has failed to plead, introduce evidence or request issues in relation to the question of no warning or adequacy of warning, it will be necessary to review the applicable portions of Rule 279, Texas Rules of Civil Procedure, in detail.

The first sentence of the second paragraph of Rule 279, supra, clearly states that if a fact issue arises during the course of the trial concerning an independent ground of recovery or of defense, and no issue is given or requested, the issue upon appeal is deemed waived. The Rule then continues with the portion of the Rule which Petitioner has paraphrased and attempts to rely upon; when copied correctly, it reads:

". . ., but where *such* [not *a*] ground of recovery or of defense consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery or of defense, and necessarily referable thereto, are submitted to and answered by the jury, and one or more of such issues are omitted, without such request, or objection, and there is evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted issue or issues in support of judgment, but if no such written findings are made, such omitted issue or issues shall be deemed as found by the court in such manner as to support the judgment." (Emphasis and portion in brackets supplied).

Initially, it is readily apparent that "such ground of recovery or of defense" relates to the "independent ground of recovery or defense" contained in the first clause of the paragraph. Thus, in order for the portion of the paragraph upon which Petitioner attempts to rely to be applicable, the following things must be present:

1. The independent ground of recovery or defense must consist of more than one issue;

2. At least one or more of the issues necessary to sustain the independent ground of recovery or defense must be submitted to and answered by the jury;

3. One or more of the issues necessary to sustain the independent ground of recovery or defense must be omitted (i.e., not submitted to or answered by the jury) without request or objection; and

4. There must be evidence to support a finding on the issue or issues which are necessary to sustain the independent ground of recovery or defense *and* which has (or have) been omitted.

If all of the foregoing requirements have been met, and then the trial court does not make any written findings on the omitted issue or issues, the omitted issue or issues then are to be deemed found in a manner to support the judgment. The appellate court has no power to find contrary to the partial findings made by the jury on submitted issues which constitute a portion of the independent ground of recovery or defense.

For a comprehensive discussion of omitted issues and presumed findings, see *Vernon's Annotated Texas Rules of Civil Procedure* following Rule 279 (Dooley, "Commentary on Submission of Special Issues"). The interpretative comment states:

> "It was not the intention of the committee to make any change in the rule, but merely to announce it as it had been formulated by the Court. Under this rule, if a ground of recovery or of defense is wholly ignored or neglected, and no issue is submitted or requested thereon, it will be held to have been waived and no recovery or defense can be based thereon. If, however, the grounds of recovery or defense consist of more than one element—that is, require more than one issue to submit them—and the court submits some of the elements but omits others, and there is no objection to the failure to submit same, the parties will be placed in the position of having agreed to waive a jury trial on the unsubmitted elements and to have submitted them to the court for his determination. Either party, after notice and before final judgment is rendered, may request the court to make an express finding on such issues. In such an event the judge may find as he thinks the evidence justifies. If he does not make such finding, then, on appeal, it will be presumed that the court found on such unsubmitted elements in such manner as to support the judgment."

The interpretative comment further states:

> "The usual example used in discussing the subject of presumed findings is the series of questions involved in an ordinary negligence case. These questions are: (1) whether the defendant did the act, or suffered the omission alleged; and (2) whether such act or omission, if found, was negligence; and (3) whether such negligence, if any, was the proximate cause of injuries to the plaintiff. These are interdependent and kindred issues in a proper sense. They deal with the same subject, that is, the alleged act or omission. The first relates to the existence of the subject, and if there is an affirmative finding, then the second determines the quality of the subject, and the third determines the causal consequences of the subject. The submission of any one of said issues is a partial submission of the whole inquiry covered by the three affiliated issues. The submission of any one of said issues ought to bring any unsubmitted issue of the group within the provision for presumed findings."

Thus, it is apparent that unless at least one issue of a whole inquiry is submitted or requested, the presumed (or deemed) findings portion of Rule 279 cannot come into play.

Yet, Petitioner, although admitting in his Petition for Writ of Certiorari that no issue was submitted or requested with regard to the warning given Petitioner's employer (Pet. App. 3-4), urges that this Court, in obvious contravention of the requirements of Rule 279, hold that the unsubmitted issue of warning be deemed found in support of the judgment. Only through a complete misinterpretation of the provisions of the rule could such a result be reached.

Petitioner, in attempting to justify his failure to plead, prove and request an issue to negative the warning given to Petitioner's employer, contends that the preparation and presentation of this cause of action, the submission of special issues to the jury and the appeal of this case were based on what he refers to as previously well-settled law, i.e., *Galveston Houston Electric Ry. Company* v. *Reinle,* 113 Tex. 456, 258 S.W. 803 (1924), which is erroneously cited by Petitioner as 258 S.W.2d 803 (Pet. App. 5).

This contention is novel in two respects. First, during oral argument before the Supreme Court of Texas on December 7, 1966, the Court requested comment on that case inasmuch as the case had not been briefed or referred to the Court's attention in any manner by the Petitioner. (See Appendix "F"). Due to this fact, briefs were filed after oral argument discussing the applicability of this supposedly "well-settled law". The other novel aspect of Petitioner's contention is the fact that both the state courts and the federal courts, in applying Texas law, had negatived and tacitly overruled the *Reinle* decision. *Tyler* v. *McDaniel,* 386 S.W.2d 552 (Dallas Civ. App., 1965, err. ref'd., no reversible error); *Gulf Oil Corp.* v. *Bivins,* 276 F.2d 753 (5 CA, 1960, cert. den. 364 U.S. 835, 81 S.Ct. 70, 5 L.Ed.2d 61); *Turner* v. *West Texas Utilities Co.,* 290 F.2d 191 (5 CA, 1961); *Nance Exploration Co.* v. *Texas Employers Ins. Assn.,* 305 S.W.2d 621 (El Paso Civ. App., err. ref'd., no reversible error, cert. den. 358 U.S. 908, 79 S.Ct. 235, 3 L.Ed.2d 229); *Texas Electric Service Co.* v. *Holt,* 249 S.W.2d 662 (Ft. Worth, Civ. App., 1952, err. ref'd., no reversible error).

In the most recent opinion delivered by a Texas court, prior to the opinion by the Texas Supreme Court in this

suit, the Dallas Court of Civil Appeals reviewed the "well-settled law" that Petitioner purportedly based his case upon in the following language:

> "It is apparently the law in Texas that an owner or occupier of property is under a duty to warn the employees of an independent contractor who has undertaken to do work on the property, of hidden or inherent dangers on or in that property, and that such duty is discharged if those in charge of the work for the independent contractor are given warning or have knowledge of the danger. That is the unequivocal holding of the United States Court of Appeals, in Gulf Oil Corp. v. Bivins, 5 Cir., 1960, 276 F.2d 753, 758, cert. den. 364 U.S. 835, 81 S.Ct. 70, 5 L.Ed.2d 61, followed by the same court in Turner v. West Texas Utilities Co., 290 F.2d 191.
>
> "The Texas authorities on this point are few and not entirely harmonious. It had been held in Proctor v. San Antonio Street Railway Co., 1901, 26 Tex. Civ. App. 148, 62 S.W. 938, 939, wr. ref., that the independent contractor owed the duty to warn his employee, but that no such duty rested upon the owner. The Supreme Court in 1924, answering certified questions, announced a contrary rule in Galveston-Houston Electric Ry. Co. v. Reinle, 113 Tex. 456, 258 S.W. 803, 806. However, we do not find this Reinle case cited in support of this particular holding a single time in the more than forty years since its publication. The duty of an owner or occupier of premises to warn the servant of an independent contractor of hidden or inherent dangers was recognized in Smith v. Henger (1950), 148 Tex. 456, 226 S.W.2d 425, 20 A.L.R.2d 853, and Roosth & Genecov Production Co. v. White (1953), 152 Tex. 619, 262 S.W.2d 99, but the exact question now before us was not decided in either of those cases. They were followed by Nance Exploration Co. v. Texas Employers' Ins. Ass'n. (1957), Tex. Civ. App., 305 S.W.2d 621, wr. ref. n.r.e., cert.

den. Flowers v. Nance Exploration Co., 358 U.S. 908, 79 S.Ct. 235, 3 L.Ed.2d 229, which involved facts quite similar to those of this case. It was held unequivocally that, since the injured workmen's superiors knew of the danger, he must be held to have also had knowledge of it.

"We are quite well persuaded that, in principle, at least, the rule of Bivins and Nance Exploration Company is correct. To hold that an owner or general contractor must warn each individual workman employed by a subcontractor of hidden or inherent dangers in the property, even though those in charge of the work for the subcontractor have full knowledge of such dangers, in our opinion, 'would result in imposing a standard of duty exceeding reasonable bounds.' Storm v. New York Telephone Co., 270 N. Y. 103, 200 N.E. 659, 662.

"It appears without controversy that Tyler's employer E. H. Roberds was thoroughly familiar with the premises, the overhead high lines and all of the dangers thereof. We therefore hold that this knowledge of Roberds was sufficient to discharge any duty resting upon appellees to warn Tyler.

"Appellant contends that there was a 'double duty' resting upon appellees; i.e., a duty not only to take such precautions as a reasonably prudent person would take to protect his invitees from dangers which are not open and obvious, but also to warn them thereof. As we understand this position, it is in practical effect that appellees owed Tyler the 'double duty' of having the electricity disconnected and of warning him that it had not been disconnected. We are unable to follow this reasoning. Performance of the first alleged duty would clearly eliminate the second, and performance of the second would obviate liability for non-performance of the first. That these are alternative, rather than double, duties is clearly held in Western Auto Supply Co. v. Campbell (Tex.

1963), 373 S.W.2d 735, 736, and announced in Restatement of the Law of Torts, Sec. 343."

Tyler v. *McDaniel*, 386 S.W.2d 522, 562-3 (Dallas Civ. App. 1965, writ ref'd.; no reversible error).

In light of this language, it is readily apparent that the opinion of the Supreme Court of Texas merely expressly overruled an old opinion which had long before been negatived by all of the courts deciding the question of whether an adequate warning given by the owner or occupier of land to the independent contractor employed to perform work on his premises is sufficient to discharge the landowner's duty to warn the employees.

Inasmuch as the Texas Supreme Court correctly interpreted and applied its own Rules of Civil Procedure and merely affirmed the state of the law governing the type of fact situation as it had existed for a number of years prior to the instant suit, it is inconceivable that one could contend that the due process of law provisions of the Fourteenth Amendment to the United States Constitution have been violated.

3. The Supreme Court of Texas merely re-stated existing law and expressly overruled its prior decision which had already been impliedly overruled.

Petitioner contends in his second point of error that the action of the Texas Supreme Court has as a practical matter and as a matter of fact denied Petitioner the right to be heard at all (Pet. App. 7). Needless to say, this contention is rather unique since the Petitioner twice had the opportunity to be heard at the trial court level; this case was fully tried on two occasions in the district court; the first trial was a hung jury (10-1 against Petitioner), and this appeal is from the second trial; furthermore,

Petitioner has had his "day in court" at both the intermediate and final state appellate court levels.

In an effort to extenuate the fact that Petitioner failed to plead, prove or request issues with regard to the warning given, Petitioner now asserts that the Texas Supreme Court by reversing the judgments of the trial court and the intermediate court of civil appeals has denied Petitioner an opportunity for a hearing (Pet. App. 4, 7).

This Court has long recognized that the concept of procedural due process of law in the adjudication of a person's claims by the courts of his own state is not a matter of concern for the Supreme Court so long as the determination by the state courts is in accordance with its own conception of policy and fairness and the decision does not offend some fundamental principle of justice. 16 Am. Jur. 2d, "Constitutional Law", Sec. 549 (1964).

Petitioner is here contending that he has been deprived of the fundamental right of an opportunity for a hearing. If Petitioner has not received a hearing, as he contends, it is merely because Petitioner was silent.

A review of the opinions in this suit by both the Supreme Court of Texas and of the Court of Civil Appeals (Pet. App. A, 3-4 and 13) discloses that both of these courts were aware of the fact that the question of warning was in the case, yet Petitioner contends that he has not been provided a hearing or opportunity for hearing on this matter.

Obviously, due process requires that a party shall have the right to raise such issues as he may have in a cause. 16 Am. Jur. 2d, "Constitutional Law", § 574 (1964). Petitioner contends that he should have another oppor-

tunity for a hearing because he failed to develop evidence on the question of warning to his employer (Pet. App. 7). He then asserts that this failure was justified because he had relied on the decision in *Galveston-Houston Electric Ry. Co.* v. *Reinle*, supra. As has been pointed out previously, this decision had been negatived and tacitly overruled long before the instant litigation ensued.

Petitioner's attempt to justify his failure to develop evidence on the question of warning is not well taken because as this Court stated in *Market Street R. Co.* v. *Railroad Com. of Cal.*, 324 U.S. 548 (1945):

> "A misapprehension by a litigant of the steps which its best interests require during a trial may be appealing grounds for a plea to the discretion of the hearing tribunal for another chance, but it is not grounds for our interference as a denial of constitutional rights."

Furthermore, should it be determined that the Supreme Court of Texas, in deciding this case, has overruled "well-settled law" on the question of warning to employees of independent contractors, Respondent contends that the Fourteenth Amendment's guaranty of due process has not been violated, and, consequently, writ of certiorari should not be granted.

Although Petitioner contends he should be accorded a trial on the issue of warning or inadequate warning, he does not indicate the source of any evidence that would militate in any way against the undisputed evidence in this record. Roy Vickers (the owner of Roy Vickers Lease Service, Petitioner's employer) and Bernie B. Smith, superintendent and the only supervisory personnel on the job where Petitioner was injured, both admitted that they were fully warned as to the pressure in the pipelines and un-

derstood what the warning meant. There could be no other person with Roy Vickers Lease Service who could refute this testimony; certainly Petitioner has not indicated how he proposes to refute it.

Another trial of this case would have precisely the same result: a judgment as a matter of law that warning was received and understood by Petitioner's employer, and such warning discharged any duty to Petitioner owing by Respondent.

In a recent decision by this Court [*Linkletter* v. *Walker*, 381 U.S. 618 (1965)], the retroactive operation of an overruling decision was discussed, and following an historical outline of the development of the law on this topic, the Court held that "the Constitution neither prohibits nor requires retrospective effect" of a decision. In so doing, the Court stated (p. 629):

> "Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weight the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."

The Court in announcing these principles relied on the earlier decision of *Great Northern R. Co.* v. *Sunburst Oil & Ref. Co.*, 287 U.S. 358 (1932), which had decided that the highest court of a state in overruling a decision may, consistently with the due process clause of the Fourteenth Amendment, make a choice for itself whether a new decision is to apply prospectively only or also to past transactions.

A recent annotation has treated the question whether an overruling decision should be given retroactive effect

or should operate prospectively only. 10 A.L.R.3d 1371 (1966). In considering the constitutional limitations in this area it was stated at pages 1391-1392:

> "At various times, contentions have been made that it not only is permissible, but also is required by constitutional provisions, that an overruling decision be denied retroactive effect. Such contentions have been based, for example, on the grounds that the retroactive application of an overruling decision would constitute an impairment of contract obligations - - -, *or a denial of due process*, or a denial of equal protection of the laws (Emphasis added).
>
> * * *
>
> "On the basis of the more recent decisions it now appears generally established that the retroactive application of an overruling decision is not prohibited by any constitutional provisions, and, specifically, that such retroactivity does not constitute an impairment of contract obligations - - -, *or a denial of due process*, or a denial of equal protection of the laws." (Emphasis added).

In the annotation (pages 1399-1401), numerous cases are discussed in which previous decisions have been overruled and the Court has applied its new rule to the matters at issue in the instant case.

In reliance on the foregoing authorities, Respondent contends that Petitioner's argument that the Due Process clause of the Fourteenth Amendment requires another trial is without foundation. As Judge Cardozo said in the *Great Northern R. Co.* case, supra, and as reiterated in the *Linkletter* decision, supra, "We think the Federal Constitution has no voice upon the subject" (as to whether the Texas Supreme Court can apply its decision retroactively or prospectively).

WHEREFORE, Respondent prays the Honorable Supreme Court to deny the petition for writ of certiorari.

Respectfully submitted,

.....

WILLIAM H. KEYS
KEYS, RUSSELL, WATSON & SEAMAN
Attorneys for Respondent

CERTIFICATE OF SERVICE

A copy of the foregoing brief has been served on Messrs. Hubert L. Stone, Jr., and Curtis B. Dyer, Attorneys for Petitioner, by United States first-class mail to their office, 902 State National Building, Corpus Christi, Texas, on the ..... day of November, 1967.

.....

WILLIAM H. KEYS

APPENDIX "A"

CLERK'S OFFICE - SUPREME COURT
Austin, Texas, July 12, 1967

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of DELHI TAYLOR OIL CORPN. v. HENRY, A-11582, was this day overruled.

Very truly yours,

Garson R. Jackson, Clerk

APPENDIX "B"

[Filed November 26, 1963]

No. 73,714-A

WILL RAY HENRY vs. DELHI-TAYLOR OIL CORPORATION	In The District Court of Nueces County, Texas 28th Judicial District

Motion for Judgment Non Obstante Veredicto

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Defendant, Delhi-Taylor Oil Corporation, and moves the Court to enter judgment for Defendant that Plaintiff take nothing notwithstanding the verdict of the jury, for the following grounds and reasons:

I

There were no material questions for a jury to determine in this cause.

II

All the evidence of any probative value clearly showed that Delhi-Taylor Oil Corporation breached no duty which it owed to Plaintiff because:

(1) Delhi-Taylor Oil Corporation warned Roy Vickers and Bernie Smith, owner and superintendent or foreman respectively of Roy Vickers Lease Service, that the pipe lines would be used for pumping refinery products to the docks and that the lines should be considered by them as being "loaded" at all times.

(2) There was no duty on Delhi-Taylor Oil Corporation to warn Plaintiff personally of the lines being "loaded".

(3) A dragline was customarily used to uncover "loaded" pipe lines and all the evidence showed that a dragline could safely be used for that purpose if the operator exercised ordinary care.

(4) Delhi-Taylor Oil Corporation had the legal right to anticipate that a dragline would be properly and reasonably carefully operated and it was not required to anticipate careless operation of the dragline which the undisputed and uncontroverted evidence showed occurred.

(5) The pressure in the toluene line constituted a condition only and not a proximate cause of the injuries to Plaintiff.

(6) The sole proximate cause of the injuries to Plaintiff was the improper operation of the dragline by permitting the bucket to be dropped onto the toluene line.

III

There was no causal relationship shown between any negligence on the part of Delhi-Taylor Oil Corporation (which is not admitted) and the injuries to Plaintiff. As a matter of law it was not reasonably foreseeable to Delhi-Taylor Oil Corporation that the use of a dragline and there being pressure in the toluene line would result in a fire causing injuries to Will Ray Henry, since Delhi-Taylor Oil Corporation had the legal right to anticipate the exercise of ordinary care on the part of the dragline operator, and there would be no damage to the pipe lines by the proper use of the dragline.

IV

Under the evidence the sole proximate cause, and the sole cause, of the injuries to Plaintiff was the dropping of the dragline bucket on the toluene line. The toluene line was shown to be in good condition and to withstand the normal operation of a dragline but not able to withstand 40 times its bucket weight.

WHEREFORE, premises considered, Defendant, Delhi-Taylor Oil Corporation, prays the Court to sustain this motion and to enter judgment that Plaintiff, Will Ray Henry, take nothing against Defendant, Dehli-Taylor Oil Corporation.

Keys, Russell, Keys & Watson
18th Floor, Driscoll Building
Corpus Christi, Texas

By .....
Attorneys for Defendant

APPENDIX "C"

[Filed November 27, 1963]

No. 73,714-A

WILL RAY HENRY vs. DELHI-TAYLOR OIL CORPORATION	In The District Court of Nueces County, Texas 28th Judicial District

Trial Brief in Support of Motions for Judgment

TO THE HONORABLE JUDGE OF SAID COURT:

SUBJECT INDEX

I. Defendant Owed No Duty to the Plaintiff Under the Circumstances Except to Warn Him of Pressure in the Lines, And This Duty Was Discharged By Warning Given to His Employer.

II. The Work to be Done Was Not Intrinsically Dangerous; In Fact, All the Evidence Showed That a Dragline Could Safely be Used to Uncover "Loaded" Pipe Lines, If Ordinary Care Was Exercised in the Operation of the Dragline.

A. All the Evidence Showed That It Was Customary Usage in Work on Pipe Lines For a Dragline to be Used to Uncover the Same, Even When "Loaded" And There Was No Evidence Showing That It Was Improper to Use a Dragline For This Purpose.

B. It Was Not Reasonably Foreseeable That Injury Would Result to the Plaintiff From the Use of the Dragline to Uncover the Toluene Line.

(1) Defendant Was Not Required to Anticipate Negligent Conduct on the Part of the Dragline Operator.

(2) The Act of the Dragline Operator Constituted a New and Independent Cause of the Injuries to Plaintiff.

(3) The Pressure in the Lines and the Direction to Use a Dragline Constituted a Remote Cause And a Condition Only And Was Not a Cause in Fact.

III. It Was Not the Nature of the Work to be Done, But the Manner of Performance That Caused the Injuries to the Plaintiff, And, Since Roy Vickers Was an Independent Contractor, No Liability Could Be Imposed on Defendant For the Negligence on the Part of the Dragline Operator.

IV. The Opinion Testimony of the Plaintiff Constituted a Conclusion And Opinion For Which No Predicate Had Been Laid.

A. Whether It Was Safe For a Dragline to be Used Was Not a Subject for Expert Testimony.

B. The Plaintiff Did Not Qualify As an Expert to Express a Conclusion And Opinion.

BRIEF OF ARGUMENT

I. Defendant Owed No Duty to the Plaintiff Under the Circumstances Except to Warn Him of Pressure in the Lines, And This Duty Was Discharged By Warning Given to His Employer.

The evidence was undisputed and uncontradicted that Delhi-Taylor had warned Roy Vickers and Bernie Smith that the pipe lines over which the work was to be done by Roy Vickers Lease Service were dock lines that would continually be used and that all lines should be considered as though they were "loaded", which clearly meant that the lines would be carrying flammable materials. It was not necessary to warn the plaintiff himself that the

lines were loaded, as the notice to his employer satisfied the duty in that regard. *Gulf Oil Corporation* v. *Bivins*, (5 C.A., 1960) 276 F.2d 753, 758.

Furthermore, there was no duty on the part of Delhi-Taylor to protect the plaintiff against negligence of the dragline operator; this principle was well stated in *Texas Electric Service Co.* v. *Holt*, (Fort Worth, 1952, n.r.e.) 249 S.W.2d 662, 668:

> "It has also been held that an employer or the contractee does not owe a duty to exercise ordinary care *to protect servants or employees of a contractor from risk arising from the negligence of said contractor or a fellow employee.* See cases cited in Humble Oil & Refining Co. v. Bell, Tex. Civ. App., 180 S.W.2d 970, at page 976." (Emphasis supplied).

II. The Work to be Done Was Not Intrinsically Dangerous; In Fact, All the Evidence Showed That a Dragline Could Safely be Used to Uncover "Loaded" Pipe Lines, If Ordinary Care Was Exercised in the Operation of the Dragline.

A. All the Evidence Showed That It Was Customary Usage in Work on Pipe Lines For a Dragline to be Used to Uncover the Same, Even When "Loaded" And There Was No Evidence Showing That It Was Improper to Use a Dragline For this Purpose.

All the evidence clearly showed that it was customary for the dragline to be used to uncover pipe lines, even where "loaded", and the evidence showed that draglines had safely been used around * * *.

APPENDIX "D"

[Filed June 8, 1964]

No. 73,714-A

WILL RAY HENRY vs. DELHI-TAYLOR OIL CORPORATION	In The District Court of Nueces County, Texas 28th Judicial District

Motion for Instructed Verdict

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Defendant, Delhi-Taylor Oil Corporation, and after the evidence was closed moves the Court to instruct the jury to return a verdict for Defendant, or, alternatively, to withdraw the case from the jury, and to enter judgment for Defendant that Plaintiff take nothing, for the following grounds and reasons:

I

There are no material questions for a jury to determine in this cause.

II

All the evidence of any probative value clearly shows that Delhi-Taylor Oil Corporation breached no duty which it owed to Plaintiff because:

(1) Delhi-Taylor Oil Corporation warned Roy Vickers and Bernie Smith, owner and superintendent or foreman respectively of Roy Vickers Lease Service, that the pipe lines would be used for pumping refinery products to the docks and that the lines should be considered by them as being "loaded" at all times.

(2) There was no duty on Delhi-Taylor Oil Corporation to warn Plaintiff personally of the lines being "loaded".

(3) A dragline was customarily used to uncover "loaded" pipe lines and all the evidence showed that a dragline could safely be used for that purpose if the operator exercised ordinary care.

(4) Delhi-Taylor Oil Corporation had the legal right to anticipate that a dragline would be properly and reasonably carefully operated and it was not required to anticipate careless operation of the dragline which the undisputed and uncontroverted evidence showed occurred.

(5) The pressure in the toluene line constituted a condition only and not a proximate cause of the injuries to Plaintiff.

(6) The sole proximate cause of the injuries to Plaintiff was the improper operation of the dragline by permitting the bucket to be dropped onto the toluene line.

III

There was no causal relationship shown between any negligence on the part of Delhi-Taylor Oil Corporation (which is not admitted) and the injuries to Plaintiff. As a matter of law it was not reasonably foreseeable to Delhi-Taylor Oil Corporation that the use of a dragline and there being pressure in the toluene line would result in a fire causing injuries to Will Ray Henry, since Delhi-Taylor Oil Corporation had the legal right to anticipate the exercise of ordinary care on the part of the dragline operator, and there would be no damage to the pipe lines by the proper use of the dragline.

IV

Under the evidence the sole proximate cause, and the sole cause, of the injuries to Plaintiff was the dropping of the dragline bucket on the toluene line. The toluene line was shown to be in good condition and to withstand the normal operation of a dragline but not able to withstand 40 times its bucket weight.

WHEREFORE, premises considered, Defendant, Delhi-Taylor Oil Corporation, prays the Court to sustain this motion and to enter judgment that Plaintiff, Will Ray Henry, take nothing against Defendant, Delhi-Taylor Oil Corporation.

Keys, Russell, Keys & Watson
18th Floor, Driscoll Building
Corpus Christi, Texas

By .....
Attorneys for Defendant

The foregoing motion was duly and timely presented to me, and after consideration thereof, the same was overruled and denied.

Signed the 8th day of June, 1964.

/s/ Horace S. Young
District Judge

APPENDIX "E"

[Filed June 18, 1964]

No. 73,714-A

WILL RAY HENRY vs. DELHI-TAYLOR OIL CORPORATION	In The District Court of Nueces County, Texas 28th Judicial District

Motion for Judgment Non Obstante Veredicto

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Defendant, Delhi-Taylor Oil Corporation, and moves the Court to enter judgment for Defendant that Plaintiff and Intervenor take nothing, notwithstanding the verdict of the jury, for the following grounds and reasons:

I

There were no material questions for a jury to determine in this cause.

II

All the evidence of any probative value clearly showed that Delhi-Taylor Oil Corporation breached no duty which it owed to Plaintiff because:

(1) Delhi-Taylor Oil Corporation warned Roy Vickers and Bernie Smith, owner and superintendent or foreman respectively of Roy Vickers Lease Service, that the pipe lines would be used for pumping refinery products to the docks and that the lines should be considered by them as being "loaded" at all times.

(2) There was no duty on Delhi-Taylor Oil Corporation to warn Plaintiff personally of the lines being "loaded".

(3) A dragline was customarily used to uncover "loaded" pipe lines and all the evidence showed that a dragline could safely be used for that purpose if the operator exercised ordinary care.

(4) Delhi-Taylor Oil Corporation had the legal right to anticipate that a dragline would be properly and reasonably carefully operated and it was not required to anticipate careless operation of the dragline which the undisputed and uncontroverted evidence showed occurred.

(5) The pressure in the toluene line constituted a condition only and not a proximate cause of the injuries to Plaintiff.

(6) The sole proximate cause of the injuries to Plaintiff was the improper operation of the dragline by permitting the bucket to be dropped onto the toluene line.

III

There was no causal relationship shown between any negligence on the part of Delhi-Taylor Oil Corporation (which is not admitted) and the injuries to Plaintiff. As a matter of law it was not reasonably foreseeable to Delhi-Taylor Oil Corporation that the use of a dragline and there being pressure in the toluene line would result in a fire causing injuries to Will Ray Henry, since Delhi-Taylor Oil Corporation had the legal right to anticipate the exercise of ordinary care on the part of the dragline operator, and there would be no damage to the pipe lines by the proper use of the dragline.

IV

Under the evidence the sole proximate cause, and the sole cause, of the injuries to Plaintiff was the dropping of the dragline bucket on the toluene line. The toluene line was shown to be in good condition and to withstand the normal operation of a dragline but not able to withstand 40 times its bucket weight.

WHEREFORE, premises considered, Defendant, Delhi-Taylor Oil Corporation, prays the Court to sustain this motion and to enter judgment that Plaintiff, Will Ray Henry, and Intervenor, Hartford Accident & Indemnity Company, take nothing against Defendant, Delhi-Taylor Oil Corporation.

Keys, Russell, Keys & Watson
18th Floor, Driscoll Building
Corpus Christi, Texas

By .....
Attorneys for Defendant

APPENDIX "F"

THE SUPREME COURT OF TEXAS
Capitol Station
Austin, Texas

78711

Robert W. Calvert
Chief Justice
Meade F. Griffin
Clyde E. Smith
Ruel C. Walker
James R. Norvell
Joe Greenhill
Robert W. Hamilton
Zollie Steakley
Jack Pope
Associate Justices

Geo. H. Templin
Clerk

December 7, 1966

Hon. James C. Watson
Attorney at Law
1806 Driscoll Building
Corpus Christi, Texas

Hon. Hubert L. Stone, Jr.
Attorney at Law
902 Corpus Christi State National Building
Corpus Christi, Texas

Re: No. A-11582

Delhi-Taylor Oil Corp. v. Will Ray Henry

Gentlemen:

The Supreme Court would like to have your comments on the case of Galveston-Houston Electric Ry. Co. v. Reinle, 258 S.W. 803, and its possible application in deciding the above case argued this morning.

Particular attention is called to the next to last paragraph on page 865.

Respectfully yours,

/s/ Geo. H. Templin
Geo. H. Templin
Clerk

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